Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1709

CLARK E. THOMAS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TABLE OF CONTENTS

Opinions Below 1
Jurisdiction 2
Question Presented 2
Constitutional Provisions Involved 3
Statement of the Case 4
Argument 6
Conclusion 16
Certification 16
Appendix—Courts' Judgment and Opinions A1

Table of Authorities

CASES

Adkins v. *Smith*, 197 So.2d 865, certiorari discharged 205 So.2d 530 10
Allen v. *State*, 52 Fla. 1, 41 So. 593 9
Ashe v. *Swenson*, 1970, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 6
Benton v. *Maryland*, 1969, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 6
Burnes v. *State*, 89 Fla. 494, 104 So. 783 9
Crim v. *State*, Ind. App. 1973, 294 N.E.2d 822 7
Donaldson v. *Sack*, Fla. 1972, 265 So.2d 499 .....4, 5, 8, 10, 12
Downum v. *U. S.*, 1963, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 .....6, 13
Ex parte Glenn, C.C. W.Va. 1901, 111 F. 257, reversed on other grounds 23 S.Ct. 851, 189 U.S. 506, 47 L.Ed. 921 7

Fong Foo v. *U. S.*, 369 U.S. 141, 7 L.Ed.2d 629, 80 S.Ct. 671 12
Furman v. *Georgia*, 1972, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 ..... 4, 5, 8, 10
Gori v. *U. S.*, 367 U.S. 364, 6 L.Ed.2d 901, 81 S.Ct. 1253 ..... 14, 15
Galloway v. *Beto*, 5 Cir. 1970, 421 F.2d 284, certiorari denied 400 U.S. 912, 91 S.Ct. 137, 27 L.Ed.2d 151 6
Himmelfarb v. *U. S.*, C.A. Cal. 1949, 175 F.2d 924, certiorari denied 90 S.Ct. 132, 396 U.S. 868, 24 L.Ed.2d 121 7
Illinois v. *Somerville*, 410 U.S. 458, 35 L.Ed.2d 425, 93 S.Ct. 1066 15
Johnson v. *New Jersey*, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 12
Jones v. *Anderson*, D.C. Ga. 1975, 404 F.Supp. 182, affirmed 522 F.2d 181, rehearing denied 525 F.2d 693 7
Laster v. *Stephenson*, Fla. 1972, 268 So.2d 387 ..... 5, 9, 10, 11, 12
Linkletter v. *Walker*, 381 U.S. 618, 14 L.Ed.2d 601, 83 S.Ct. 1731 ..... 11, 12
Mapp v. *Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 84 ALR2d 933 ..... 11, 12
McKay v. *Raines*, D.C. Kan. 1975, 405 F.Supp. 363 7
McNeal v. *Hollowell*, C.A. Miss. 1973, 481 F.2d 1145, certiorari denied 94 S.Ct. 1476, 415 U.S. 951, 39 L.Ed.2d 567 ..... 7, 9
North Carolina v. *Pearce*, 1969, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 6
Price v. *Georgia*, 1970, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 6
Serfass v. *U. S.*, Pa. 1975, 95 S.Ct. 1055, 420 U.S. 377, 43 L.Ed.2d 265 7

Smith v. *State of Mississippi*, C.A. Miss. 1973, 487 F.2d 88, certiorari denied 94 S.Ct. 844, 414 U.S. 1113, 38 L.Ed.2d 740 ..... 7, 15
State ex rel. Cacciatore v. *Drumbright*, 116 Fla. 496, 156 So. 721, 97 ALR 154 9-10
State ex rel. Dato v. *Himes*, 134 Fla. 675, 184 So. 244, rehearing denied 135 Fla. 203, 184 So. 648 10
State ex rel. Landis v. *Lewis*, 118 Fla. 910, 160 So. 485 10
State ex rel. Wheeler v. *Cooper*, 157 So.2d 875 10
State ex rel. Williams v. *Grayson*, 90 So.2d 710, 63 ALR2d 777 ..... 10, 15
Tehan v. *United States ex rel. Shott*, 382 U.S. 406, 15 L.Ed.2d 453, 86 S.Ct. 459 12
U. S. v. *Ball*, 1896, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 6
U. S. v. *Frumento*, D.C. Pa. 1975, 405 F.Supp. 23 7
U. S. v. *Glover*, C.A. N.Y. 1974, 506 F.2d 291 7
U. S. v. *Jorn*, 1971, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 15
U. S. v. *Kehoe*, C.A. Tex. 1975, 516 F.2d 78, rehearing denied 521 F.2d 815, certiorari denied 96 S.Ct. 1103, 424 U.S. 909, 47 L.Ed.2d 313, rehearing denied 96 S.Ct. 1687, 425 U.S. 945, 48 L.Ed.2d 189 7
U. S. v. *Llaca Orbiz*, C.A. Puerto Rico 1975, 513 F.2d 816, certiorari denied 96 S.Ct. 117, 423 U.S. 861, 46 L.Ed.2d 88, rehearing denied 96 S.Ct. 578, 423 U.S. 1039, 46 L.Ed.2d 415 7
U. S. v. *Perez*, 1824, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 ..... 13, 14
U. S. v. *Sanabria*, C.A. Mass. 1976, 548 F.2d 1, certiorari granted 97 S.Ct. 2970 7

U. S. v. *Sebastian*, D.C. N.Y. 1977, 428 F.Supp. 967 7
U. S. v. *White*, C.A. Tex. 1975, 524 F.2d 1249, certiorari denied 96 S.Ct. 2629, 426 U.S. 922, 49 L.Ed.2d 375 7
U. S. v. *Wilson*, C.A. Ky. 1976, 534 F.2d 76 7
U. S. ex rel. Rogers v. *LaValle*, C.A. N.Y. 1975, 517 F.2d 1330, certiorari denied 96 S.Ct. 866, 423 U.S. 1078, 47 L.Ed.2d 89 7
U. S. ex rel. Webb v. *Court Common Pleas of Philadelphia County*, C.A. Pa. 1975, 516 F.2d 1034 7
Wade v. *Hunter*, 1949, 336 U.S. 684, 69 S.Ct. 834, 92 L.Ed. 974 ..... 7, 13, 15
Waller v. *Florida*, 1970, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 6

CONSTITUTIONAL PROVISIONS

Constitution of Florida (1968)—
Article One, Declaration of Rights, Section 9 3
Constitution of the United States—
Amendment V 2, 3, 6
Amendment XIV 2, 3, 6, 11

In the Supreme Court of the United States

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No. .....

CLARK E. THOMAS,
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vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment and orders of the Supreme Court of Florida.

OPINIONS BELOW

The discharge of a jury of twelve, duly chosen and sworn to try a defendant for first degree murder, by the Circuit Court of the Ninth Judicial Circuit of Florida, Orange County, occurred on July 18, 1972, and the opinion is not reported. The judgment and sentence of the Criminal Court of Record for Orange County, Florida based on the verdict of a six man jury, adjudicating guilt of first degree murder and sentencing defendant to life imprisonment, occurred on September 24, 1972, and is not reported. The opinion and order of the Circuit Court of the Ninth Judicial Circuit of Florida, Orange County, denying defendant's Motion to Vacate and Set Aside Judgment of

Sentence and Conviction under Florida Criminal Procedure Rule 3.850 was entered on February 12, 1976, and is not reported. Defendant's appeal, In Propria Persona, to the District Court of Appeal for the Fourth District of Florida was dismissed on May 19, 1977, and is not reported, Petition for Rehearing and for Reinstatement of Appeal being denied on June 24, 1977, and not being reported. Defendant's Petition for Certiorari filed in the Supreme Court of Florida was dismissed on July 20, 1977, and is not reported, being reinstated on August 4, 1977, which opinion is not reported, Petition for Writ of Certiorari being denied on March 13, 1978, not being reported. The above judgments and orders of the respective courts are attached hereto as an appendix.

JURISDICTION

The order of the Supreme Court of Florida denying Petition for Writ of Certiorari was entered on March 13, 1978. The jurisdiction of this Court is invoked under 28 USC 1257(3).

QUESTION PRESENTED

Where the defendant was charged by Grand Jury indictment with first degree murder and proceeded to trial in the Circuit Court of the Ninth Judicial Circuit of Florida, a jury of twelve being impaneled and sworn, and discharged by the Court the following day, the defendant was subjected to double jeopardy in violation of the defendant's constitutional rights under the Fifth and Fourteenth Amendments when he was subjected to a second trial before six jurors for the identical offense in the Criminal Court of Record for Orange County, Florida.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without the just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA (1968)

Article One, Declaration of Rights, Section 9

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

STATEMENT OF THE CASE

Defendant was charged in the Circuit Court for the Ninth Judicial Circuit of Florida, Orange County, on March 9, 1972, by indictment returned by a Grand Jury, with first degree murder in violation of Florida Statute Section 782.04, and at an arraignment on March 10, 1972, entered a plea of not guilty.

Jury selection began on July 17, 1972, and a jury of twelve, plus two alternates, was chosen, sworn, and placed in the jury box. (Transcript of excerpts of proceedings for July 17, 18, 1972, page 2). The jury was sequestered, and on the following day, July 18, 1972, was discharged by the Court upon reading in the newspaper of the decision of the Supreme Court of Florida in the case of *Donaldson* v. *Sack*, Fla., 265 So.2d 499, rendered on July 17, 1972, as a result of the decision of the Supreme Court of the United States in *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, which held against the death penalty as provided under the Florida legislation then in effect, with a decision which became final on July 24, 1972. The Supreme Court of Florida found in its opinion that Circuit Courts in Florida no longer had jurisdiction in cases theretofore delineated as "capital" in those Florida counties having a Criminal Court of Record, and this decision also became final on July 24, 1972. (Transcript of excerpt of proceedings for July 18, 1972, pages 8, 18).[1]

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1. The opinion in *Donaldson* v. *Sack*, revealed at page 501 of the decision that the Plaintiff had been indicted for murder in the first degree but immediately prior to the commencement of the scheduled trial had moved to dismiss or transfer his case to the Criminal Court of Record on the ground that by reason of the decision in *Furman* v. *Georgia*, that the Circuit Courts in Florida in counties having Criminal Courts of Record lacked jurisdiction. The Supreme Court of Florida issued a Writ of

(Continued on following page)

Upon direct information filed in the Criminal Court of Record for Orange County charging the identical offense under the same statute as had been contained in the indictment in the Circuit Court wherein a twelve man jury had been impaneled and sworn, and then discharged, the Petitioner, Thomas E. Clark, was subjected to a second trial. Following the selection of a six man jury, a verdict of guilty was returned on September 24, 1972, and the defendant adjudicated guilty of murder in the first degree and sentenced to life imprisonment.

The defendant, *In Propria Persona*, filed a Rule 3.850 Motion to Vacate and Set Aside the Judgment of Sentence and Conviction on December 19, 1975, upon a claim of double jeopardy in that the case had proceeded to trial in the Circuit Court wherein a jury had been impaneled and discharged and that the trial in the Criminal Court of Record before a six man jury constituted double jeopardy and violated defendant's constitutional rights, which motion was denied on February 12, 1976, with prejudice, whereupon the defendant, *In Propria Persona*, thereupon timely filed a Notice of Appeal to the District Court of Appeal, Fourth District of Florida, which Appeal was dismissed on May 19, 1977, and a rehearing denied on June 24, 1977. Defendant then timely filed a Petition for

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Footnote continued—

Prohibition to prohibit the Circuit Judge from proceeding with the trial in the Circuit Court. In the case of *Laster* v. *Stephenson*, Fla., 268 So.2d 387, where the defendant was tried for a capital offense by a jury verdict rendered on July 17, 1972, it was determined that the Circuit Court had jurisdiction on July 17, 1972; that *Donaldson* v. *Sack*, although decided on July 17, 1972, was not immediately effective and did not become effective until July 24, 1972, and that Laster was properly tried and convicted in the Circuit Court for murder in the first degree but that the cause should be transferred to the Criminal Court of Record in the county for imposition of sentence since *Furman* v. *Georgia*, merely declared that the death penalty could not be imposed under the Florida statute then in effect.

Certiorari in the Supreme Court of Florida which was erroneously dismissed sua sponte, subject to reinstatement if timeliness was established on proper motion, which was thereafter filed and Motion for Reinstatement granted on August 4, 1977. On March 13, 1978, the Supreme Court of Florida denied the Petition for Writ of Certiorari. The constitutional question of double jeopardy thus presented and first raised at trial was thereafter preserved throughout all steps of the appellate procedure.

ARGUMENT

The Fifth Amendment's proscription against placing a person in jeopardy twice for the same offense has been applied to the states through the Due Process Clause of the Fourteenth Amendment and this application must be made retroactively. *Benton* v. *Maryland*, 1969, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707; see *Price* v. *Georgia*, 1970, 398 U.S. 323, 331 n. 9, 90 S.Ct. 1757, 26 L.Ed.2d 300; *Ashe* v. *Swenson*, 1970, 397 U.S. 436, 437 n. 1, 90 S.Ct. 1189, 25 L.Ed.2d 469; *Waller* v. *Florida*, 1970, 397 U.S. 387, 391 n. 2, 90 S.Ct. 1184, 25 L.Ed.2d 435; *North Carolina* v. *Pearce*, 1969, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656; *Galloway* v. *Beto*, 5 Cir. 1970, 421 F.2d 284, certiorari denied 400 U.S. 912, 91 S.Ct. 137, 27 L.Ed.2d 151.

Because "(t)he prohibition is not against being twice punished, but against being twice put in jeopardy," *United States* v. *Ball*, 1896, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300, it is necessary to determine when jeopardy attaches in a jury trial. In *Downum* v. *United States*, 1963, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100, the Supreme Court recognized that this occurs when the jury is impaneled and sworn, thus vesting the defendant with the valued right to have his trial complete before the tribunal

and that jury. See *Wade* v. *Hunter*, 1949, 336 U.S. 684, 689, 69 S.Ct. 834, 92 L.Ed. 974.

It has been repeatedly stated that in a jury case, jeopardy attaches when a jury has been impaneled and sworn. *Himmelfarb* v. *U. S.*, C.A. Cal. 1949, 175 F.2d 924, certiorari denied 90 S.Ct. 132, 396 U.S. 868, 24 L.Ed.2d 121; *Ex parte Glenn*, C.C. W.Va. 1901, 111 F. 257, reversed on other grounds 23 S.Ct. 851, 189 U.S. 506, 47 L.Ed. 921; *Serfass* v. *U. S.*, Pa. 1975, 95 S.Ct. 1055, 420 U.S. 377, 43 L.Ed.2d 265; *U. S. ex rel. Rogers* v. *LaVallee*, C.A. N.Y. 1975, 517 F.2d 1330, certiorari denied 96 S.Ct. 866, 423 U.S. 1078, 47 L.Ed. 2d 89; *U. S. ex rel. Webb* v. *Court of Common Pleas of Philadelphia County*, C.A. Pa. 1975, 516 F.2d 1034; *U. S.* v. *Sanabria*, C.A. Mass. 1976, 548 F.2d 1, certiorari granted 97 S.Ct. 2970; *U. S.* v. *Wilson*, C.A. Ky. 1976, 534 F.2d 76; *U. S.* v. *White*, C.A. Tex. 1975, 524 F.2d 1249, certiorari denied 96 S.Ct. 2629, 426 U.S. 922, 49 L.Ed.2d 375; *U. S.* v. *Kehoe*, C.A. Tex. 1975, 516 F.2d 78, rehearing denied 521 F.2d 815, certiorari denied 96 S.Ct. 1103, 424 U.S. 909, 47 L.Ed.2d 313, rehearing denied 96 S.Ct. 1687, 425 U.S. 945, 48 L.Ed.2d 189; *U. S.* v. *Llaca Orbiz*, C.A. Puerto Rico 1975, 513 F.2d 816, certiorari denied 96 S.Ct. 117, 423 U.S. 861, 46 L.Ed.2d 88, rehearing denied 96 S.Ct. 578, 423 U.S. 1039, 46 L.Ed.2d 415; *U. S.* v. *Glover*, C.A. N.Y. 1974, 506 F.2d 291; *McNeal* v. *Hollowell*, C.A. Miss. 1973, 481 F.2d 1145, certiorari denied 94 S.Ct. 1476, 415 U.S. 951, 39 L.Ed.2d 567; *Smith* v. *State of Miss.*, C.A. Miss. 1973, 487 F.2d 88, certiorari denied 94 S.Ct. 844, 414 U.S. 1113, 38 L.Ed.2d 740; *U. S.* v. *Sebastian*, D.C. N.Y. 1977, 428 F.Supp. 967; *McKay* v. *Raines*, D.C. Kan. 1975, 405 F.Supp. 363; *U. S.* v. *Frumento*, D.C. Pa. 1975, 405 F.Supp. 23; *Jones* v. *Anderson*, D.C. Ga. 1975, 404 F.Supp. 182, affirmed 522 F.2d 181, rehearing denied 525 F.2d 693.

Jeopardy attaches in a criminal trial when the jury has been selected and sworn even though no evidence has been taken. *Crim* v. *State*, Ind. App. 1973, 294 N.E.2d 822.

The factual situation to be here considered is unique, and no precedents will be found upon the same factual circumstances.

The defendant went to trial on a Grand Jury indictment for murder in the first degree in the Circuit Court, on Monday, July 17, 1972, and the first day of the trial was spent in picking a twelve man jury which was then impaneled, sworn, and sequestered for the night. By the following morning when the trial resumed on Tuesday, July 18, 1972, the presiding judge had learned from a newspaper article that the Supreme Court of Florida had rendered an opinion in the case of *Donaldson* v. *Sack*, 265 So. 2d 499, finding that by reason of the decision of the Supreme Court of the United States in *Furman* v. *Georgia*, 480 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, that the death penalty could no longer be imposed under the Florida legislation then in effect. The Supreme Court of Florida, in its opinion in *Donaldson* v. *Sack*, reasoned that by the ruling in *Furman* voiding capital punishment as then legislated, that there were no longer any "capital" cases, and that in those 17 counties in Florida having Criminal Courts of Record, all criminal cases should thereafter be tried before the Criminal Court of Record. In the remaining 50 of the 67 counties in Florida, the trials would continue in the Circuit Court.

In *Donaldson* v. *Sack*, the opinion revealed at page 501, that the trial of Sack for murder in the first degree had not yet begun, and the Court reasoned that the case should be transferred to the Criminal Court of Record, and that a Writ of Prohibition would issue to prevent trial in the Circuit Court, the decision becoming final on July 24, 1972 (the same date upon which *Furman* v. *Georgia* became final).

The trial of another first degree murder case begun on July 17, 1972, presented a somewhat different factual situation in *Laster* v. *Stephenson*, 268 So.2d 387. A jury was selected, impaneled and rendered its verdict finding Eddie James Laster guilty of manslaughter on July 17, 1972, whereupon the case was transferred to the Criminal Court of Record. The Appellate Court found no difficulty in the defendant being sentenced in the Criminal Court of Record after having been tried and found guilty in the Circuit Court on July 17, 1972. In a ruling on double jeopardy the Appellate Court found the proceeding in the Circuit Court to be with jurisdiction through July 24, 1972. The Court further concluded:

> "If the record showed that the court was about to retry Laster, prohibition would lie • • • It is obvious that Laster cannot be retried in that court because he has already been tried in a court of competent jurisdiction and found guilty of a lesser offense."

In the case *sub judice*, the Petitioner, Clark E. Thomas, proceeded to trial before a jury of twelve, impaneled and sworn on July 17, 1972, whereupon the presiding judge, *without declaring a mistrial*, discharged the jury and transferred the cause to the Criminal Court of Record (which did not then have jurisdiction per *Laster* v. *Stephenson*, supra). The defendant was then subjected to a second trial before a jury of six, found guilty, and sentenced to life imprisonment.

The discharge of the jury amounted to an acquittal since jeopardy had attached when the jury had been duly impaneled to try and determine the issue. *McNeal* v. *Hollowell*, C.A. Miss. 1973, 481 F.2d 1145, certiorari denied 94 S.Ct. 1476, 415 U.S. 951, 39 L.Ed.2d 567. Also to the same effect, see *Allen* v. *State*, 52 Fla. 1, 41 So. 593; *Burnes* v. *State*, 89 Fla. 494, 104 So. 783; *State ex rel. Cacciatore*

v. *Drumbright*, 116 Fla. 496, 156 So. 721, 97 ALR 154; *State ex rel. Landis* v. *Lewis*, 118 Fla. 910, 160 So. 485; *State ex rel. Dato* v. *Himes*, 134 Fla. 675, 184 So. 244, rehearing denied 135 Fla. 203, 184 So. 648; *State ex rel. Williams* v. *Grayson*, 90 So.2d 710, 63 ALR2d 777; *State ex rel. Wheeler* v. *Cooper*, 157 So.2d 875; *Adkins* v. *Smith*, 197 So.2d 865, certiorari discharged 205 So.2d 530. As long as the Circuit Court continued to have jurisdiction, the Defendant was entitled to trial by a twelve member jury as impaneled. *Furman* v. *Georgia*, supra, took away no substantive rights of the Defendant but merely declared that the punishment or penalty upon conviction could not be imposed under a Statute similar to that in Florida where the jury had discretion to determine the imposition of the death penalty.

Neither did *Donaldson* v. *Sack*, supra, take away any substantive rights to a twelve member jury as long as the Circuit Court had jurisdiction, but determined only that after *Donaldson* became effective at noon, July 24, the cause should be transferred to the Criminal Court of Record for the conclusion of the matter. As pointed out in *Laster*, *Donaldson* v. *Sack* did not authorize a retrial or new trial in the Criminal Court of Record. The proper procedure in the case *sub judice* would have been to proceed with the trial before the jury then impaneled to a final determination and rendition of a verdict. If found guilty, the case could be transferred to the Criminal Court of Record as in *Laster* for imposition of sentence. As pointed out in *Laster*, the Circuit Court had jurisdiction to complete the trial, and the adjudication of guilt or innocence was not thereby affected by *Furman* or *Donaldson*, only the maximum sentence which could be imposed.

The trial in both *Laster* and the case *sub judice* were begun in the Circuit Court on July 17, 1972. Laster was found guilty and thereafter sentenced after *Donaldson* became effective at noon, on July 24, by a transfer to the Criminal Court of Record for imposition of sentence. In the case *sub judice*, although the Circuit Court had jurisdiction, the jury was discharged with the legal effect of acquittal, since a retrial in the Criminal Court of Record amounted to double jeopardy. As pointed out in *Laster*, had the Criminal Court of Record proceeded to retry Laster, prohibition would lie "because he has already been tried in a court of competent jurisdiction".

In considering whether or not a holding of unconstitutionality has a retroactive effect, the Supreme Court of the United States, in *Linkletter* v. *Walker*, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731, determined that such holding of unconstitutionality does not operate retrospectively. In *Mapp* v. *Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 84 ALR2d 933, the Supreme Court had held that exclusion of evidence seized in violation of the provisions of the Fourth Amendment was required of the States by the Due Process Clause of the Fourteenth Amendment, and advised as to the retroactive effect:

> "This case presents the question of whether this requirement operates retrospectively upon cases finally decided in the period prior to Mapp. The Court of Appeals for the Fifth Circuit held that it did not, and we granted certiorari in order to settle what has become a most troublesome question in the administration of justice. We agree with the Court of Appeals."

In reasoning that the case should not have retroactive application, the Court concluded:

> "It was the judgment of this Court that changed the rule and the date of the opinion is the crucial date. * * * All that we decide today is that though the error complained of might be fundamental it is not of

the nature requiring us to overturn all final convictions based upon it. After full consideration of all the factors we are not able to say that the Mapp rule requires retrospective application."

In the later case of *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 15 L.Ed.2d 453, 86 S.Ct. 459, the Supreme Court of the United States in again refusing to apply a holding of unconstitutionality retroactively discussed *Linkletter* and *Mapp* v. *Ohio*, concluding that there would be no retrospective application.

The Supreme Court of the United States in *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772, when called upon to determine whether *Escobedo* and *Miranda* should apply retrospectively, again concluded that they should *not*, stating:

"In the light of these various considerations, we conclude that Escobedo and Miranda, like Mapp v. Ohio, supra, and Griffin v. California, supra, should not be applied retroactively."

In the case of the Petitioner herein, Clark E. Thomas, the presiding judge, in light of the controlling law as announced in *Laster* v. *Stephenson*, committed an error of law in discharging the jury rather than proceeding with the trial to verdict of the jury. If found guilty the case would then be transferred to the Criminal Court of Record for imposition of sentence after *Donaldson* v. *Sack* became effective on July 24, 1972.

In the case of *Fong Foo* v. *United States*, 369 U.S. 141, 7 L.Ed.2d 629, 89 S.Ct. 671, the court concluded the presiding judge committed an error of law in directing the jury to return a verdict of acquittal upon supposed improper conduct of an Assistant U. S. Attorney and lack of credibility in the testimony of witnesses for the prosecution

who had testified up to that point. The Court of Appeals granted a Petition for Writ of Mandamus, praying that the Judgment of Acquittal be vacated upon grounds that the trial court was without power to direct the Judgment of Acquittal in question; but the Supreme Court in its decision found that the acquittal was final and could not be reviewed, and that despite the error of law, that the defendant could not be put twice in jeopardy in violation of his constitutional rights.

In the case of Petitioner, Clark E. Thomas, although the presiding judge *did not declare a mistrial*, the defendant lost a valued right to trial before a twelve man jury, being thereafter subjected to double jeopardy at a second trial. Even if the presiding judge had declared a mistrial, there was no "manifest necessity" as first prescribed in *United States* v. *Perez*, 1824, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 wherein Mr. Justice Story, in laying down the touchstone for determining when reprosecution may follow an aborted trial, after discharge of a jury, stated:

"To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes: and, in capital cases especially Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner."

In *Wade* v. *Hunter*, 336 U.S. 684, 93 L.Ed. 974, 69 S.Ct. 834, the test required was an "imperious necessity". In *Downum* v. *U. S.*, 372 U.S. 734, 10 L.Ed.2d 100, 83 S.Ct. 1033, in refusing a second trial and finding double jeopardy, the Court could not find a "manifest necessity" for the discharge of the jury, finding:

"Harassment of an accused by successive prosecution or declaration of a mistrial so as to afford the prose-

cution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori* v. *United States*, supra (367 US 369). But those extreme cases do not mark the limits of the guarantee. The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances,' to use the words of Mr. Justice Story in *United States* v. *Coolidge* (CC Mass) 2 Gall 364, F Cas No 14858. For the prohibition of the Double Jeopardy Clause is 'not against being twice punished; but against being twice put in jeopardy.' *United States* v. *Ball*, 163 US 662, 669, 41 L ed 300, 302, 16 S Ct 1192."

Gori v. *U. S.*, 367 U.S. 364, 6 L.Ed.2d 901, 81 S.Ct. 1523, in again reviewing when double jeopardy might apply upon mistrial and retrial, reviewed the controlling authority starting when *Perez*, supra, concluding a mistrial could be granted only if there is a "manifest necessity" for the act, or the ends of public justice would otherwise be defeated. In a separate opinion in that case, Mr. Justice Douglas observed:

> "While the matter is said to be in the sound discretion of the trial court, that discretion has some guidelines—'a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.' Id. 336 US 690.
>
> To date these exceptions have been narrowly confined. Once a jury has been impaneled and sworn, jeopardy attaches and a subsequent prosecution is barred, if a mistrial is ordered—absent a showing of imperious necessity. As stated by Mr. Justice Story in *United States* v. *Coolidge*, (CC Mass) 2 Gall 488, F Cas No 14858, the discretion is to be exercised 'only in very extraordinary and striking circumstances'."

In *Smith* v. *State of Mississippi*, 478 F.2d 88 (1973) the court again applied the rule of "manifest necessity" for the trial judge to declare a mistrial quoting *Perez* and proceeding to a determination of whether *Downum*, *Gori* or *Jorn* applied to a state murder conviction. In *United States* v. *Jorn*, 1971, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543, the trial judge was found to have abused his discretion in discharging the jury and declaring a mistrial to give witnesses who might incriminate themselves the right to consult with their attorneys. The Supreme Court found that such arbitrary action could not support a finding of "manifest necessity".

In *Illinois* v. *Somerville*, 410 U.S. 458, 35 L.Ed.2d 425, 93 S.Ct. 1066, the Supreme Court again reviewed the foregoing decisions beginning with *Perez* and including *Gori*, *Hunter*, and *Jorn* stating:

> "The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one. *United States* v. *Jorn*, supra. Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy in the absence of some important countervailing interest of proper judicial administration. Ibid."

The Supreme Court of Florida found that the urgent or necessary reasons that justify the discharge of a jury after it has been impaneled and sworn are: (1) illness of the judge, the accused, or a juror requiring the absence of any of them from the court, or (2) the inability of the jury to agree on a verdict after deliberation, or (3) the consent of the accused himself. *State ex rel. Williams* v. *Grayson*, (Fla.) 90 So.2d 710, 63 ALR2d 777.

In the present case before this court, the Petitioner Thomas E. Clark, was deprived of a twelve man jury already sworn and impaneled, and the presiding judge, without any "imperious necessity" or "manifest necessity" discharged the jury, thereby effecting an acquittal of Thomas with the consequent second trial before a jury of six constituting double jeopardy.

CONCLUSION

For the foregoing reasons we respectfully conclude that the discharge of the jury impaneled and sworn was not a manifest necessity or imperious necessity, and that the defendant was thereafter subjected to double jeopardy in a second trial upon the same offense, and that by reason thereof this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT G. MURRELL
SAM E. MURRELL & SONS
Post Office Box 1748
Orlando, Florida 32802
Attorneys for Petitioner

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to Robert L. Shevin, Attorney General, Attorney for Respondent, Tallahassee, Florida, this 24th day of May, 1978.

ROBERT G. MURRELL
Attorney

APPENDIX

PROCEEDINGS FOR JULY 17, 18, 1972, PAGE 18, 21 CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT OF FLORIDA:

Judge:

"That the defendant is remanded to custody and this case is transferred to the Criminal Court of Record in this County. This jury is discharged with thanks of the Court".

"Now as to these jurors, I am going to discharge the jury • • • and the jury is discharged."

"We will be in recess subject to call."

JUDGMENT AND SENTENCE OF THE CIRCUIT COURT OF RECORD FOR ORANGE COUNTY:

"You, CLARK E. THOMAS, now being before the Court, attended by your attorney, Fred A. Jones, and you having been tried and found guilty of murder in the first degree, the Court adjudges that you are guilty of said offense.

Done and Ordered in open Court at Orlando, Florida this 24th day of September, 1972, pursuant to Rule 1.670 R.C.P.

/s/ Claude R. Edwards
Judge of Said Court"

ORDER OF THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT.—ORDER DENYING DEFENDANT'S MOTIONS UNDER THE CRIMINAL PROCEDURE RULE 3.850:

"Defendants moved under Criminal Rule 3.850 for relief from their conviction of first degree murder. Trial was held before the undersigned as a Judge pro tempore, by appointment of the now-defunct Criminal Court of Record in and for Orange County, Florida. Verdict of guilty, adjudication and sentencing took place on September 24, 1972. The defendants were severally represented by aggressive able counsel. Defendants' post-trial motions, appeals, petition for certiorari and proceedings in the U.S. District Court have been unsuccessful. The instant motions filed jointly consist of some 35 pages of carefully hand-printed argument, facts and authorities. The motions, as nearly as the Court can determine, mount three stated principal attacks on the convictions and sentences: (a) Court lacked jurisdiction; (b) 6 'man' verdict was denial of due process and unconstitutional; (c) absence of preliminary hearing.

The facts are set out with apparent accuracy in the motion. This Court will not bore the movants or burden the record with a further recitation thereof.

It is fairly clear that petitioners gained some support for their position in *Laster vs. Stephenson,* (Fla. App.2 1972) 268 So. 2d 387.

Although the point is not raised directly in petitioners' motions, the main thrust of issues (a) and (b), supra, is that of double jeopardy. (e.g. If the Circuit Court had jurisdiction at the time the first jury was sworn, and a new trial in Circuit Court was

granted, double jeopardy would appear to attach.) The question of double jeopardy has been disposed of in the case of *Thomas vs. Massey,* Orlando Civil 74-230 in the United States District Court for the Middle District of Florida, Orlando Division, which opinion was filed and decided on January 15, 1975.

This Court would observe that *Laster* is merely an attempt by the intermediate appellate court, to deal with a knotty problem on a piece-meal basis. The question of how to accommodate due process with the utter confusion exhibited by the Justices and created by the decision in *Furman vs. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 32 L.Ed.2d 346 (1972) makes it difficult enough for members of the bar and bench to follow. As to the analysis by the movants of *Donaldson vs. Sack,* (Fla. 1972) 265 So. 2d 499, the Court would observe that the matters raised by movants have been dealt with in other decisions and may be said to lack essential merit primarily because of the effect of the word 'consistent' in the quotation from *Donaldson* in movants' motions at page 10.

The Court would further observe that at the time the convictions of the movants were affirmed by the Fourth District Court of Appeal (Certiorari Petitions to Supreme Court of Florida were dismissed) the *Laster* case had been published in reports and was available for counsel and the Fourth District Court of Appeal to consider.

The question of denial of a preliminary hearing is without substantial merit.

Accordingly, the motions of movants are hereby denied with prejudice.

This Court deplores a legal system which allows repeated appeals by those convicted in fair trials under due process of law, under the guise of various motions and under access to the Federal Courts, for the reason that the Courts are overburdened with the ordinary administration of justice in due course. This added burden obviously violates the rights of other citizens to a speedy and inexpensive determination of their cases by clogging the dockets of the Court. Nevertheless, the Court commends the movants for their determination and persistence and for their pained and painstaking analysis of *Donaldson* and for their attempts to use *Laster* as a springboard.

Movants are hereby advised that they have 30 days from the entry of this Order within which to appeal the same.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 11th day of February, 1976.

/s/ Claude R. Edwards, Circuit Judge
Claude R. Edwards, Circuit Judge"

DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA (STAMPED ON MOTION TO QUASH FRIVOLOUS APPEAL)

"CONSIDERED and GRANTED Appeal in Orange County Case No. 72-879 is Dismissed. 5/19/77 EJC. Emmett J. Comiskey, Clerk, Fourth District Court of Appeal".

ORDER OF THE DISTRICT COURT OF APPEAL ON REHEARING (STAMPED ON PETITION FOR REHEARING)

"CONSIDERED AND DENIED 6/24/77 EJC. Emmett J. Comiskey, Clerk, Fourth District Court of Appeal".

ORDER OF THE SUPREME COURT OF FLORIDA DATED JULY 20, 1977

"It appearing to the Court that the Petition for Writ of Certiorari was not timely filed, it is Ordered that the Petition is hereby dismissed sua sponte, subject to reinstatement of timeliness is established on proper motion *filed* within 15 days from the date of this Order. See Rule 4.5c(6), Florida Appellate Rules".

ORDER OF THE SUPREME COURT OF FLORIDA DATED AUGUST 4, 1977

"Petitioners Motion for Reinstatement is hereby granted".

ORDER OF THE SUPREME COURT OF FLORIDA DATED MARCH 13, 1978
CASE NO: 52-051

"This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the records deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5C(6), and it appearing to the Court that it is without jurisdiction it is so Ordered that the Petition for Writ of Certiorari be, and the same is hereby denied. Oberton, C.J., Atkins, Boyd, England & Hatchett, J.J., concur."